

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

ANTOLIN ANDREW MARKS,

**Plaintiff,**

V.

JOHN AND JANE DOES (1-36), BOARD OF DIRECTORS OF GEO GROUP, GEO GROUP, INC., JANET NAPOLITANO, JAMES HAYES, DAVE JENNINGS, ERIC HOLDER, NEIL CLARK, TOM GILES, GEORGE WIGEN, and DEANNA GEPHARDT,

### Defendants.

No. C09-5489 RJB/KLS

## **REPORT AND RECOMMENDATION**

**Noted For: April 22, 2011**

Before the court is Plaintiff's motion for voluntary dismissal. ECF No. 43. Plaintiff informs the Court that "the issues within the complaint have been resolved and the action is hereby dismissed, with prejudice, as to these claims, as to all defendants." The undersigned recommends that this action be dismissed pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure.

## BACKGROUND

By Order dated August 10, 2009, Chief Judge Robert S. Lasnik determined that Plaintiff may proceed in this action only on his claim that certain Defendants knowingly built the facility in which he is housed on contaminated land and that Plaintiff has developed skin cancer and other injuries attributable to his exposure to toxic chemicals. All other claims asserted in the complaint are barred. ECF No. 7.

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1 Plaintiff named several federal employees as defendants: James T. Hayes, Jr.,  
2 Director, Office of Detention and Removal, U.S. Immigration and Customs Enforcement  
3 ("ICE"); A. Neil Clark, Field Office Director, Office of Detention and Removal, ICE; Tom  
4 Giles, Assistance Field Office Director/Officer in Charge, Office of Detention and Removal,  
5 ICE; Janet Napolitano, Secretary of the United States Department of Homeland Security; David  
6 W. Jennings, Deputy Field Office Director, Office of Detention and Removal, ICE; Eric Holder,  
7 Attorney General of the United States of America, and Deanna Gephhardt, Health Services  
8 Administrator, Division of Immigration Health Services, U.S. Public Health Services  
9 (collectively the "Federal Defendants"). On March 2, 2010, all of Plaintiff's claims against  
10 Defendants Jennings, Napolitano and Holder were dismissed with prejudice. ECF Nos. 23 and  
11 24. Plaintiff was given an opportunity to file an amended complaint as to his claims against  
12 Defendants Hayes, Giles, Clark and Gephhardt. ECF No. 22. He failed to do so and on April 30,  
13 2010, the court dismissed Plaintiff's personal capacity claims against Defendants Hayes, Giles,  
14 Clark and Gephhardt with prejudice. ECF No. 26.

17 With regard to Plaintiff's claims against Defendants Hayes, Clark and Giles in their  
18 official capacities, the government moved to dismiss these claims because: (1) they can  
19 only be brought under the Federal Tort Claims Act ("FTCA"), (2) under the FTCA, the United  
20 States is the only proper defendant, and (3) Plaintiff failed to exhaust his administrative remedies  
21 under the FTCA. *See* ECF No. 14. However, this court found that 28 U.S.C. § 2679(d)(1)  
22 requires substitution of the United States as the party defendant only after the attorney general  
23 certifies that the defendant employees were acting within the scope of their office or  
24 employment. Without the certification, the exhaustion of remedies argument is not applicable.  
25 ECF No. 21. That recommendation was adopted by the Court and the case was re-referred to the  
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1 undersigned for resolution of the remaining claims. ECF Nos. 24, 26.

2 On January 10, 2011, the government filed the Notice of Certification of Jenny A.  
3 Durkan Re: Scope of Employment Pursuant to 28 U.S.C. § 2679(d)(1). ECF No. 38. The  
4 government re-filed their motion to dismiss and the undersigned has recommended that the  
5 motion be granted and that the remaining claims against the Federal Defendants be dismissed  
6 with prejudice. ECF No. 42. The report and recommendation is presently noted for April 8,  
7 2011. *Id.*

8 As to the remaining Defendants, Geo Group, Inc., Board of Directors of Geo Group, and  
9 George Wigen (collectively “the GEO Defendants”), Plaintiff was granted leave to provide  
10 alternative service addresses and the clerk sent service of process to the Board of Directors of  
11 GEO Group, Inc. on January 25, 2011. To date, no returns of service have been received.

12 Under Rule 41(a)(1), a plaintiff may dismiss an action without court order either by filing  
13 a notice of dismissal before the opposing party serves either an answer or a motion for summary  
14 judgment; or a stipulation of dismissal is signed by all parties who have appeared. Fed. R. Civ.  
15 P. 41(a)(1). Rule 41(a)(2) provides, in pertinent part:

16 Except as provided in Rule 41(a)(1), an action may be dismissed at the  
17 plaintiff’s request only by court order, on terms that the court considers proper. If  
18 a defendant has pleaded a counterclaim before being served with the plaintiff’s  
19 motion to dismiss, the action may be dismissed over the defendant’s objection  
20 only if the counterclaim can remain pending for independent adjudication. Unless  
21 the order states otherwise, a dismissal under this paragraph (2) is without  
22 prejudice.

23 Fed.R.Civ. P. 41(a)(2).

24 The GEO Group Defendants have not yet entered their appearance or answer in this  
25 mater. Plaintiff seeks a dismissal with prejudice as to all claims and as to all defendants. As  
26 noted above, his claims against the Federal Defendants have either already been dismissed with

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1 prejudice or it has been recommended that they be dismissed with prejudice. Accordingly, the  
2 undersigned recommends that the Court dismiss this action with prejudice.

3 **CONCLUSION**

4 The Court should dismiss this action with prejudice.

5 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil  
6 Procedure, the parties shall have fourteen (14) days from service of this Report and  
7 Recommendation to file written objections. See also Fed. R.Civ.P. 6. Failure to file objections  
8 will result in a waiver of those objections for purposes of appeal. *Thomas v. Arn*, 474 U.S. 140  
9 (1985). Accommodating the time limit imposed by Rule 72(b), the clerk is directed to set the  
10 matter for consideration on **April 22, 2011**, as noted in the caption.

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13 **DATED** this 4th day of April, 2011.  
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16 Karen L. Strombom  
17 United States Magistrate Judge  
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